

**Stanford Linear Accelerator Center, a Division of
Leland Stanford Jr. University (SLAC) and
Louis E. Davoli.** Case 20-CA-26960

May 21, 1999

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On March 18, 1997, Administrative Law Judge Gerald A. Wacknov issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed an answering brief to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and the complaint is dismissed.

Jonathan Seagle, Esq., for the General Counsel.
Eli W. Gould, Esq. (McCutchen, Doyle, Brown & Enersen), of
Palo Alto, California, for the Respondent.

¹ The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We adopt the judge's finding that the Respondent did not, as alleged, violate Sec. 8(a)(3) and (1) of the Act by dismissing and thereafter refusing to rehire Louis Davoli. In doing so, however, we do not agree with the judge that the General Counsel established a prima facie case of discriminatory layoff and nonhire. Although Davoli testified that he had told the Respondent's representatives, Josef Rehacek and Richard Atkinson, that he had videotaped work at the Respondent's facility in order to help secure more work for the union-represented employees, the judge discredited this testimony. He found, based on the credited denials of Atkinson and Rehacek, that none of the Respondent's representatives who had anything to do with Davoli's dismissal knew of his alleged protected union activity. Without this knowledge, there is no basis for finding that there was a prima facie case of discriminatory conduct. We also agree with the judge that even if there was a prima facie case the Respondent rebutted it. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) (approved in *NLRB v. Transportation Maintenance Corp.*, 462 U.S. 393 (1983)).

Member Fox agrees with her colleagues that the General Counsel has failed to show that antiunion sentiment was a motivating factor in the dismissal of and refusal to rehire Louis Davoli. She therefore finds it unnecessary to pass on the Respondent's alternative defense that even if Davoli's protected activity was a motivating factor the Respondent would have taken the same actions even in the absence of his protected activity.

DECISION

STATEMENT OF THE CASE

GERALD A. WACKNOV, Administrative Law Judge. Pursuant to notice, a hearing in this matter was held before me in San Francisco, California, on January 16 and 17, 1997. The original charge was filed on October 10, 1995, by Louis E. Davoli, an individual. Thereafter, the charge was amended on November 27, 1995. On February 29, 1996, the Regional Director for Region 20 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing alleging violations by Stanford Linear Accelerator Center (the Respondent or SLAC) of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). The Respondent's answer, duly filed, denies that it has violated the Act as alleged.

The parties were afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, and to introduce relevant evidence. Since the close of the hearing, briefs have been received from counsel for the General Counsel (the General Counsel) and counsel for the Respondent. On the entire record, and based on my observation of the witnesses and consideration of the briefs submitted,¹ I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent is a nonprofit corporation with an office and place of business located in Menlo Park, California, and has been engaged in the business of education and research, including the operation of a nuclear accelerator research facility sometimes referred to as SLAC. In the course and conduct of its operations, the Respondent annually derives gross revenues, excluding contributions which, because of limitation, by the grantor are not available for operating expenses, in excess of \$1 million, and purchases and receives goods and materials valued in excess of \$5000 directly from points outside the State of California. It is admitted and I find that the Respondent is engaged in commerce or in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

It is admitted and I find that at all material times International Brotherhood of Electrical Workers, Local 617, AFL-CIO (the Union) has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. The Issues

The principal issue raised by the pleadings is whether the Respondent has violated Section 8(a)(1) and (3) of the Act by dismissing and thereafter refusing to rehire an employee of a subcontractor because of the employee's protected concerted and/or union activities.

B. The Facts

Louis Davoli (the Charging Party) is a member of the Union. Over a period of many years he has been hired on various occasions by Valhalla Builders and Developers (Valhalla) as a journeyman electrician and has been assigned to work on various

¹ As there has been no provision in this proceeding for the filing of reply briefs, the Respondent's reply brief has not been considered.

projects at the Respondent's linear accelerator site in Palo Alto, California. The record indicates that Davoli's last such period of employment began on about December 14, 1994, and ended on July 20, 1995, and that during this period he worked on several different projects at the Respondent's jobsite. The last project on which he worked commenced in about May 1995.² Thus, he worked some 2-1/2 months on this final project.

Davoli testified that in July he overheard a union organizer telling other union people on the site that it would be useful for them to document the different types of work then being carried out at the site, as this would be the subject of a forthcoming meeting between representatives of the Union and the Respondent. Thereupon, on July 14, Davoli took it upon himself to videotape certain electrical work that was being performed by Respondent's plant maintenance electricians rather than by outside contractors, apparently believing that such work should be performed by Valhalla employees or other union employees at union scale, in accordance with Davis-Bacon Act proscriptions. Davoli took this videotape during a one-half-hour period between 6 and 6:30 a.m., prior to his regular starting time which was 7 a.m. Apparently, no employees were working at the time, and Davoli did not testify that he was observed in this endeavor by any employees or any representatives of the Respondent.

Thereafter, Davoli advised his union business representative, Joseph Hogan, that he had taken the video. He offered it to Hogan, but Hogan said that he was not interested in seeing it because he already had photographs "of different things out there." Davoli further testified that he also advised his foreman, another Valhalla employee by the name of Dick Korfman, that he was going to take the videotape of the work and, later, that he had done so, because "We've got to fight for our work. We're getting less and less work all the time."

In addition, Davoli testified that sometime after July 14 he also told Josef Rehacek, one of Respondent's representatives, what he had done, and explained that the video was for use by the union representatives for the purpose of attempting to obtain additional work for union members at the Respondent's jobsite. He told Rehacek this because he just wanted to keep Rehacek apprised of his activities as Rehacek was "kind of like a friend to me." Davoli had no concerns about letting Rehacek know of his activities in this regard.

He also told Richard Atkinson, another representative of the Respondent, what he had done. Davoli testified that he didn't know why he wanted Atkinson to have this information, but that, "I just wasn't afraid to tell anybody what I was doing." Atkinson, according to Davoli, didn't say anything in response.

On July 20, Davoli was laid off. His Valhalla foreman, Korfman, told him that he was going to be laid off that day. Davoli then went to Ponce Rodriguez, the Respondent's supervisor, and Rodriguez, according to Davoli, said that the layoff was purely for economic reasons.³ Davoli testified that prior to this layoff he had never received any complaints about his job performance either from his Valhalla foreman, Korfman, or from any representative of the Respondent.

² All dates and time periods hereinafter are within 1995 unless otherwise specified.

³ When asked again, on cross-examination, what Rodriguez said, Davoli testified that in addition to telling him that the layoff was for purely economic reasons, Rodriguez stated that "there was somebody there who didn't want me there where I was working."

On August 9, Davoli was sent back to the jobsite by Valhalla. Upon presenting himself to Starlyne Thompson, an associate project administrator, he was initially told to fill out some papers, and thereafter Thompson sent him back to Valhalla after telling him that in fact there was no work available.

Dick Korfman is a working electrical foreman for Valhalla at the Respondent's site. He is a union member. Korfman testified that during Davoli's last period of employment, no personnel of the Respondent made any complaints to him about Davoli's technical expertise. However, Korfman testified that several days prior to Davoli's layoff he was told by Rodriguez that Davoli had been making personal unauthorized phone calls on the phone, and had been spending too much time talking, and "that there were a couple of parties . . . that disapproved of his presence and that's why he was being removed." Korfman's Board affidavit states that:

Sometime after Davoli told me that he planned to videotape the work on the job site, I learned from Ponce Rodriguez that Davoli was going to be laid off. I asked Ponce Rodriguez why Davoli was being laid off, and Rodriguez told me that Davoli had offended someone working for SLAC. I never learned who the person was that Davoli had allegedly offended. I also heard that Davoli was talking too much and he was making unauthorized personal telephone calls on the SLAC telephones."

Korfman testified on cross-examination that he recalled "a number" of conversations with Rehacek wherein Rehacek told him that "Davoli spends too much time talking. He should shut up and work more." Moreover, Korfman recalls that he "may have" indicated his agreement with Rehacek that Davoli "talked a little bit too much." Korfman testified that he later learned that the complaints and concerns about Davoli were emanating from Jeff Rifkin and Rich Atkinson who did not want him on the job because of talking too much and using the phones too much. Korfman said nothing to Rehacek about Davoli's videotaping, and there is no evidence that any of the Respondent's representatives indicated to Korfman that they were aware of Davoli's videotaping activities.

Jeff Rifkin was a project engineer for the Respondent at times material here. Rifkin's recollection was that Davoli began working on his particular project in April or May, and within a week or two thereafter Rifkin, who would visit the construction site several times a day on a random basis, observed that on a majority of these visits Davoli just didn't seem to be working. Rather, he was eating, standing around, and/or engaging other workers in conversation. Moreover, Rifkin was receiving similar information from the other coordinators and project engineers on the project, including Atkinson.

Thereupon, Rifkin complained to Rodriguez, who was responsible for the Valhalla electricians. Rifkin told him that Davoli's performance on the job was unsatisfactory. Thereafter, as things did not seem to change, he complained "fairly regularly" about Davoli's work habits. However, Davoli was permitted to work until July 20, at which time he was dismissed because, according to Rifkin, there was not enough work for two electricians; and thereafter Korfman worked alone. Further, Rifkin made it clear to Rodriguez that once Davoli was laid off he didn't want Davoli working there in the future. Rifkin testified that he did not know anything about Davoli's alleged videotaping or other union activities in which Davoli may have been engaged.

Josef Rehacek was associate number one coordinator on the project, and reported directly to Rodriguez, a project supervisor. Rehacek testified that about the end of May he heard complaints relayed to him from Project Manager Atkinson that he and other project personnel were dissatisfied with Davoli because he was observed remaining on the phone for long periods of time, and talking with other workers and disturbing them while they were supposed to be working. Immediately thereafter Rehacek went to Korfman, Valhalla's electrical foreman, relayed Atkinson's complaints about Davoli, and asked Korfman to take care of the problem. Korfman, according to Rehacek, said that he would take care of all the problems with Davoli that Rehacek had pointed out.

Rehacek, who is coordinator for several projects, testified that he had never personally observed Davoli standing around and not working, as his responsibilities for this and other projects kept him busy and he did not have much time to observe the daily activities of the electricians. Rehacek specifically denied that Davoli said anything to him about the alleged videotaping or about engaging in any other union activities, and testified that he had no idea that Davoli was engaged in such activities. On about July 19, he did tell Davoli, pursuant to Rodriguez' instructions, that Davoli was being laid off.

Richard Atkinson was technical coordinator of the project and reported directly to Rifkin. His job was to observe the work of the workmen on the job and to keep an eye on everything. He believes that the Valhalla electricians began working on the project in about April or May. Thereafter, Atkinson observed that the work habits of Davoli were very unprofessional as he was not working much of the time. Further, Atkinson had received complaints from several ironworkers on the job, also Valhalla employees, that Davoli would come around and talk to them and keep them from doing their work; and other union electricians working for other contractors told him that Davoli just wanted to do the minimal amount of work possible. Finally, Rifkin made comments to him about Davoli's standing around talking, and asked Atkinson whether the electricians had work to do.

About a month after Davoli began working on the instant project Atkinson spoke to Rodriguez about the situation, but things did not seem to change. Atkinson believes that Davoli was dismissed on about July 20 because of the joint request of Rifkin and Atkinson who requested Davoli's dismissal approximately a week prior to the time he was actually dismissed; however, Rodriguez decided to wait until the electrical work had essentially been completed. Atkinson denied that Davoli advised him of his videotaping or other union activities, and testified that he was not aware of such alleged activities until after Davoli filed the instant charge and apparently made such allegations which the Board thereafter investigated.

Ponce Rodriguez was group leader for the project. He was Rehacek's immediate supervisor. Rodriguez testified that he heard complaints about Davoli's work performance from Atkinson on one occasion and from Rifkin on two occasions. One complaint was in late June and the other was in early July. He directed Rehacek to bring the matter to the attention of Davoli's foreman, Korfman, and Rehacek reported that he had done so. About a week later Rehacek reported that there didn't seem to be any improvement in Davoli's work habits. On the second occasion that Rifkin brought the matter to Rodriguez' attention, he told Rifkin that the electrical work was declining and recommended that they wait a short time until they ran out of work

before letting Davoli go. Rodriguez testified that he made the decision to dismiss Davoli because the Respondent was running out of work and the small amount of work remaining could be performed by one electrician.

At the time Davoli was dismissed, Rodriguez had heard nothing about any videotaping or other union activities in which Davoli may have been engaged. The final decision to dismiss Davoli was made on July 19, and on that day Davoli came to his office and asked why he was going to be laid off. Rodriguez told him that the work was slowing down and also that there were complaints from Rodriguez' superiors about Davoli's work habits. In late June or early July, prior to Davoli's dismissal, the third electrician left for personal reasons and as work was declining he was not replaced.

James Tonkin is president of Valhalla. Tonkin testified that initially, on about July 20, he was told that Davoli was laid off for lack of work. Later, on about August 10, he learned that the Respondent just didn't want Davoli on the job any longer and that Davoli was deemed to be unacceptable. Tonkin testified that the first time he heard from any of the Respondent's personnel that Davoli had been engaged in videotaping on the Respondent's jobsite was some 3 weeks after a conversation with the Respondent's project administrator, Ben Goodman, which, according to the testimony of Goodman, *infra*, occurred sometime in September or October. On this occasion, according to Tonkin, he was told by Starlyne Thompson, that the Respondent had not wanted Davoli back on the job and, further, that Davoli had a camcorder and was videotaping on the Respondent's property. Tonkin's testimony was admittedly confused and he stated that he did not have an accurate recollection of either the various aforementioned conversations or of the various time sequences during which the conversations may have occurred.

Starlyne Thompson, associate project administrator, testified that several days prior to August 9 she was instructed to advise Valhalla that the Respondent needed an additional electrician but that it did not want Valhalla to send Davoli back out to the site. She phoned Valhalla's controller, Donna Serrano, and relayed this information to her. However, to her surprise, Davoli appeared for work at the jobsite on August 9. Initially, Thompson gave him some employment papers to complete and then told him that the materials for the job had not yet been received and instructed Davoli to return to Valhalla. Thompson testified that she was untruthful with Davoli as she did not want to create a potential confrontational situation by telling him that he was no longer acceptable to the Respondent. Thompson further testified that she did not know anything about Davoli's videotaping on the job and that the only conversation she had with Tonkin about the matter occurred on August 9, when she explained to him that Davoli was not wanted back on the job because he was very talkative and disruptive.

Donna Serrano, controller for Valhalla, testified that on August 9, after Davoli had been dispatched to the Respondent, she received a phone call from Thompson who said that the Respondent didn't want Davoli for that particular job and that the Respondent was going to lay him off because he was talking too much and because "he had a big mouth." Nothing was said at that time about videotaping; rather, Serrano testified that she did not hear about the videotaping until about October or November when her boss, Tonkin, mentioned to her that he had learned this from some other source.

C. Analysis and Conclusions

I conclude that the evidence presented by the General Counsel establishes a prima facie case that Davoli's dismissal and/or the Respondent's refusal to accept him for future employment was violative of the Act. Thus, the General Counsel has presented evidence to the effect that Davoli had been an acceptable employee at the Respondent's jobsite for an extended period of time, that he had engaged in union and/or protected concerted activity by attempting to secure work for union members, that representatives of the Respondent had knowledge of such activities as Davoli had specifically informed them of the nature and purpose of such endeavors, and that shortly thereafter he was dismissed from the job and thereafter was considered unacceptable for reemployment.

I further conclude, however, that the Respondent has sustained its burden of proof and has demonstrated by abundant credible record evidence that its treatment of Davoli was motivated by legitimate nondiscriminatory considerations. Thus, I credit each of the witnesses for Respondent who testified that Davoli's work habits were unacceptable because of the inordinate amount of time he spent talking with others rather than performing the work he had been assigned. In this regard I find that his conduct was reported to his Valhalla foreman, Korfman, who said that he would speak to Davoli and endeavor to correct the situation. Nevertheless, Davoli's work habits did not improve thereafter.

I further find that as of the time Davoli was initially dismissed on July 20, none of the Respondent's representatives who had anything to do with his dismissal were aware of the alleged union activity in which he claims he was engaged, and in this regard I do not credit the self-serving testimony of Davoli that he directly told certain of the Respondent's representatives of his videotaping activities. The record shows, and I find, that Davoli's videotaping contentions first came to the

attention of the Respondent several months after August 9, the day when Davoli was refused further employment. In this regard I credit the testimony of Donna Serrano, controller for Valhalla, who testified that she did not become aware of Davoli's alleged videotaping activities until her boss, James Tonkin, mentioned it to her sometime in October or November.

Accordingly, on the basis of the foregoing, I find that the Respondent has sustained its burden of proof under *Wright Line*⁴ and I shall therefore dismiss the complaint here in its entirety.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has not violated the Act as alleged.

On these findings of fact and conclusions of law, I issue the following recommended

ORDER⁵

The complaint is dismissed in its entirety.

⁴ 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.